

## Security Committee

SECOM-D-386

8 DEC 1980

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Mr. Peter Garcia  
Deputy Associate Director  
Division of Personnel Investigations  
Office of Personnel Management  
Post Office Box 886  
Washington, D.C. 20044

Dear Mr. Garcia:

We have reviewed our proposed regulations that will modify current procedures relating to the use of certain Office of Personnel Management (OPM) investigatory information by OPM and other agency personnel. We understand that you believe these modifications are necessary by reason of the recent federal court decision in Doe v. U.S. Civil Service Commission, 483 F. Supp. 539 (SDNY 1980). The Intelligence Community is aware of the Doe decision and its potential impact, and we are presently reviewing our position as to the applicability of Doe to the maintenance and dissemination of Intelligence Community security and intelligence information. Although we have not taken a final position on this matter, we have, nevertheless, reached a preliminary conclusion that the Doe decision, for a variety of reasons, should not be construed as applying to the national security activities of the United States.

With the foregoing in mind, our comments about your proposed regulations concern their applicability to the maintenance and dissemination of security and intelligence information. We believe that your regulations should provide for the exemption of matters relating to the national security and that such an exemption would be upheld in the courts, even in the aftermath of Doe. Moreover, we believe that your proposed regulations should contain a clear disclaimer that would serve the purpose of disassociating your regulations as much as possible from the Intelligence Community, so that in the event these matters are ever litigated, the courts will not be tempted to find your regulations as a useful precedent. Finally, we believe that your proposed regulations should indicate the fact that security criteria and determinations are separate and apart from employment criteria and determinations. For these reasons, we propose that the following specific changes be made in various sections of your proposed regulations:

AGENCY PROCEDURES

1. Paragraph 2 of this section should be amended by deleting the period and adding the words "if it is clearly consistent with the national security to do so."

2. Paragraph 2a(1) of this section should be amended by adding after the word "decision" and before the word "the" the words "and if national security permits."

3. Paragraph 2a(2) of this section should be amended by deleting the period and adding the words "if it is clearly consistent with the national security to do so."

4. The first sentence of paragraph 2b(1) of this section should be amended by adding after the words "unfavorable decision" the words "the following procedures apply to the extent consistent with the national security." This paragraph should be further amended by starting a new sentence immediately following the words "It must."

5. Paragraph 2b(2) of this section should be amended by adding after the words "final selection process" and before the words "the following procedure" the words "to the extent consistent with the national security."

OPM INTERNAL PROCEDURES

1. The introductory language in Paragraph 6 should be amended by deleting the third sentence and substituting the following two sentences: "This practice has been held in one instance by a court to be in conflict with the subject's constitutional right to confront an accuser. The disseminator of this information was subject to personal liability when the information was, in fact, erroneous."

2. Paragraph 7 should be amended by adding a second sentence to read as follows: "OPM Investigators must state that such protection is available."

3. Paragraph 7 should be further amended by deleting the last sentence and adding the following sentence: "If the source refuses to withdraw the request for confidentiality, the information from that source will not be reported, unless it is provided to a requesting Agency for lead purposes only and the requesting Agency certifies that such information will not serve as a basis for any unfavorable decision, nor will such information be maintained, without open source corroboration."

4. Paragraph 7 should be further amended by adding the following sentence at the end of the paragraph: "When such information cannot be corroborated by OPM or the requesting Agency and is therefore deleted, the investigative report must indicate that information was collected concerning the subject which was subsequently deleted pursuant to this paragraph."

5. Paragraph 8 should be amended by deleting the words "security/suitability" and substituting the words "security or suitability."

6. Paragraph 10 should be amended by adding the following sentence to the end of the paragraph: "This paragraph shall not prohibit an agency from retaining OPM investigatory reports, or OPM information on clear NAC/NACI cases, when it is in the interests of the national security to do so."

7. Paragraph 12 should be amended by deleting the words "employment/security" and substituting the words "employment or security."

8. A new paragraph 15 should be added to this section to read as follows:

When any information maintained by OPM indicates that an intelligence agency has an interest in a person for security clearance or access purposes, OPM shall exempt such information from 5 U.S.C. 552a(c)(3), which requires release of the accounting of disclosures of Privacy Act information, if the intelligence agency informs OPM that such information should be exempt pursuant to 5 U.S.C. 552a(k)(1).

9. A new section should be added with a new paragraph 16 to read as follows:

#### SCOPE OF REGULATION

In the interests of the national security, the procedures required by this regulation shall not apply to any intelligence agency that receives information from OPM for security clearance and access purposes; provided that no intelligence agency shall be exempt from the certification requirement of paragraph 7. Nothing in this regulation shall be construed to limit, impair or otherwise affect the authority of any intelligence agency to collect and disseminate information for security clearance and access purposes.

NOTICE TO INDIVIDUALS COMPLETING FEDERAL INVESTIGATIVE FORMS  
(ATTACHMENT 2 TO FPM BUL. 732-4)

PURPOSES AND USES

1. The first sentence of this section should be amended by deleting everything after the words "in the federal service" and substituting the words "or for security clearance and access determinations."

2. The third sentence of this section should be amended by deleting the words "for employment purposes, including" and substituting the words "for purposes of."

3. The fifth sentence of this section should be amended by adding after the words "security clearance" and before the word "determinations" the words "and access."

NOTICE TO INDIVIDUALS THAT A PERSONNEL INVESTIGATION  
IS BEING MAINTAINED IN OPM'S SYSTEM OF RECORDS

(ATTACHMENT 3)

1. The first paragraph of this attachment should be amended by deleting everything after the words "in the Federal service" and substituting the words "or for security clearance and access determinations."

2. The second paragraph of this attachment should be amended by adding after the words "security clearance" and before the word "determinations" the words "and access."

We realize, of course, that your proposed regulations were primarily aimed at investigations conducted for suitability and qualifications purposes, which is the context in which the Doe decision was rendered. However, as presently formulated, your proposed regulations would have considerable adverse impact upon Intelligence Community equities. Considering our view of the limited effect of Doe, we believe that your proposed regulations can be narrowed as we have outlined above without violating the constitutional interests that any person may have.

Please contact me after you have had the opportunity to review our proposed modifications so that we may discuss this matter further.

Sincerely,

[Redacted Signature]

Chairman

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This proposal is intended to change a number of procedures in the control and dissemination of investigative reports compiled by OPM, and in the adjudication and notification procedures. The changes proposed will affect user agencies as well as OPM internal procedures.

### AGENCY PROCEDURES

1. OPM personnel investigations, National Agency Check (NAC), National Agency Check and Inquiries (NACI), and Background Investigation (BI), will be forwarded only to an agency security officer. The agency security officer will maintain controls on all OPM investigative reports within the agency on a strict "need-to-know" basis.

2. Within ninety (90) days of receipt of an OPM-conducted investigation, the agency will adjudicate the case, provide appropriate due process protection, and certify to OPM the action taken if it is clearly consistent with the national security to do so.

a. Favorable decisions.

(1) Background Investigation (BI):

After a tentative selection followed by a favorable decision, and if national security permits, the agency shall, within ninety (90) days from receipt of the report of investigation, notify OPM of its decision by use of a Form DPI-73, and destroy the copy of the report of investigation. Form DPI-73 (Attachment 4) "Report of Action After OPM Investigation" will replace the Standard Form 73 and is revised to accommodate the proposals in this attachment.

(2) NAC/NACI:

Clear cases will not be forwarded to the requesting agency. In clear cases, only a notification that the NAC/NACI was processed clear will be sent. Agencies that have an agreement with OPM to receive the written inquiry replies in clear cases will be required to destroy such replies within ninety (90) days of receipt if it is clearly consistent with the national security to do so.

b. Unfavorable decisions.

(1) When an agency, as a result of information in an OPM report of investigation, changes a tentative decision (selection, promotion, grant clearance, etc.) to an unfavorable decision, the following procedures apply to the extent consistent with the national security. It must provide the subject the specific reason(s) for the decision based on the information in the report, and allow the person a specified period of time, fifteen (15) calendar days, to respond. An extension of time to respond may be granted for sufficient cause. The subject must be given an opportunity to respond orally, in writing, or both, and to have the right of representation.

The agency must then consider all of the information received, including the subject's response, if any, before a final decision is rendered. The agency will, within ninety (90) days, certify to OPM by DPI-73 the action taken, and furnish to OPM a copy of any administrative review file created. An administrative review file should consist of a copy of all written challenges, replies, or documentation supplied by the subject, a written summary of any oral response, and the OPM report of investigation. If the subject fails to avail himself or herself of the opportunity to respond, documentation to that effect will be provided to OPM with the DPI-73. Where appropriate, OPM may grant an agency an extension of time beyond ninety (90) days to complete the administrative review process.

(2) When an agency is considering more than one candidate for a position and the report of investigation will be used for a qualifications determination in the final selection process, to the extent consistent with national security, the following procedure will be used:

- An official other than the selecting official will review the reports of investigation for non-qualifications related information (i.e., information that impugns the subject's character) and remove such information from the report of investigation before the report is provided to the selector (selection panel).

- After the qualifications determination and selection has been made, the screener will re-review the complete report on the selected candidate(s). If the report of investigation is clear, the selection process will proceed.

- If the report of investigation of the selected candidate(s) contains unfavorable information, the selector will be apprised of the information and given the opportunity to reaffirm or reverse the selection(s).

- If the selection is reaffirmed, the process goes forward.

- If the selection is reversed, the agency must follow the due process procedures as outlined in 2.b.(1) above.

3. The agency may provide unclassified information from the report of investigation to the subject. However, if the agency desires to release the entire report to the subject, the agency must contact the originator of the report (OPM, FBI, DoD, etc.) and obtain permission to do so on a case-by-case basis.

#### NOTICE TO SUBJECT

4. Revised OPM Document #14, "Notice to Individuals Completing Federal Investigative Forms" (Attachment 2) which is provided to each subject at the time of completion of the personnel investigation forms, will contain specific language notifying individuals of their right to obtain a copy of their investigative file and to request amendment of the file.

5. OPM, upon receipt of the DPI-73 from the agency, will mail the subject of the investigation a form DPI #6, "Notice to Individuals that a Personnel Investigation File is Being Maintained in OPM's System of Records" (Attachment 3). This new form will be used to notify the subject that an investigative file is now a part of the System of Records at OPM and explains the procedures to be followed to obtain a copy of the file.

#### OPM INTERNAL PROCEDURES

6. The Privacy Act provides for the granting of confidentiality to sources providing information to the Government. OPM reports of investigation historically have contained information from confidential sources. This practice has been held in one instance by a court to be in conflict with the subject's constitutional right to confront an accuser. The disseminator of this information was subject to personal liability when the information was, in fact, erroneous.

7. OPM proposes changing the reporting procedures of sources granted confidentiality. OPM Investigators will provide a source who requests identity protection such a pledge in obtaining the information from that source. OPM Investigators must state to all sources that such protection is available. Investigators will make every attempt to obtain or corroborate pertinent information from that source through other open sources. If the information is deemed pertinent and cannot be developed from other open sources, an attempt will be made to have the protected source withdraw the request for confidentiality. If the source refuses to withdraw the request for confidentiality, the information from that source will not be reported, unless it is provided to a requesting agency for lead purposes only and the requesting agency certifies that such information will not serve as a basis for any unfavorable decision, nor will such information be maintained, without open source corroboration. When such information cannot be corroborated by OPM or the requesting agency and is therefore deleted, the investigative report must indicate that information was collected concerning the subject which was subsequently deleted pursuant to this paragraph.

8. OPM will continue to carefully screen each report of investigation prior to release to the requesting agency to insure that all information is security or suitability related and that prohibited matters are not included in the report or otherwise reflected in the file.

9. OPM proposes changing the retention schedule of investigative files from twenty (20) to seven (7) years. This change advances the intent of the Privacy Act, which requires that records are maintained with "such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." The seven (7) year retention will cover investigative needs and is consistent with retention periods as under the Bankruptcy Act, Fair Credit Reporting Act, and other statutes.

10. OPM will retain the master copy of the investigative report. The copy provided to the requesting agency will either be destroyed or returned to OPM. No file will be created or maintained on clear NAC/NACI cases. Further dissemination of an OPM investigative file (other than for OPM survey or research purposes) will be strictly controlled and made only for bona fide employment or security considerations. This paragraph shall not prohibit an agency from retaining OPM investigative reports or OPM information on clear NAC/NACI cases when it is in the interest of the national security to do so.

11. OPM's Security Investigations Index (SII) retention schedule will be fifteen (15) years. The SII will continue as a central index of all personnel investigations conducted and will contain a record of the agency conducting the investigation; the agency requesting the investigation; the date of the report; and the type of investigation conducted. The fifteen (15) year index retention period will provide



leads to agency records that may contain information on the subject of an investigation which is needed for coverage of Special Background Investigations that provide for fifteen (15) year coverage.

12. Copies of reports conducted by other investigative agencies that are in OPM's System of Records, as part of an investigation conducted by OPM, will be destroyed in the seven (7) year retention schedule. Copies of OPM reports that are furnished to another investigative agency as part of an investigation the other agency is conducting will be included in that agency's system of records and will be destroyed according to that agency's published destruction schedule. The OPM report may not be considered in an employment or security clearance process without specific OPM permission, once the report becomes seven (7) years old.

13. OPM will review each agency's action through the DPI-73. The action taken will be recorded in the subject's investigative file at OPM. On unfavorable decisions, the DPI-73 and the copy of the administrative review file will be postaudited to assure that appropriate due process was available to the subject of the investigation. OPM will make appropriate changes to the master file copy of the report of investigation based on information in the administrative review file.

14. OPM's Security Appraisal Program personnel will analyze the data resulting from the DPI-73 information and administrative review files. The information will be for use in evaluating the personnel investigations and security programs of Federal agencies.

15. When any information maintained by OPM indicates that an intelligence agency has an interest in a person for security clearance or access purposes, OPM shall exempt such information from 5 U.S.C. 522a(c), which requires release of the accounting of disclosures of Privacy Act information, if the intelligence agency informs OPM that such information should be exempt pursuant to 5 U.S.C. 552a(k)(1).

#### SCOPE OF REGULATION

16. In the interests of the national security, the procedures required by this regulation shall not apply to any intelligence agency that receives information from OPM for security clearance and access purposes; provided, that no intelligence agency shall be exempt from the certification requirement of paragraph 7. Nothing in this regulation shall be construed to limit, impair, or otherwise affect the authority of any intelligence agency to collect and disseminate information for security clearance and access purposes.

NOTICE TO INDIVIDUALS COMPLETING FEDERAL INVESTIGATIVE FORMSAUTHORITY

This information is provided pursuant to Public Law 93-579 (Privacy Act of 1974), December 31, 1974, for individuals completing Federal investigative forms. The authority to collect the information on the attached form is derived from one or more of the following: Title 5, Code of Federal Regulations, section 5.2, Title 5, U.S. Code, sections 1303, 1304 and 3301; sections 8(b), 8(c), and 9(c) of Executive Order 10450; Title 42 U.S. Code, section 2455; and Title 22, U.S. Code, sections 1434 and 2585.

PURPOSES AND USES

The information you supply will be used principally as a basis for an investigation to determine your fitness for employment in the Federal Service or for security clearance and access determinations. As part of such an investigation, the Standard Form 87 (Fingerprint Chart) will be sent to the Federal Bureau of Investigation and may be retained there. This information and information developed through investigation may be furnished to designated officers and employees of agencies and departments of the Federal Government for purposes of a security clearance determination, an access determination, an evaluation of qualifications, suitability, and loyalty to the U.S. Government, and a determination regarding qualifications or suitability for performing a contractual service to the Federal Government. The information may also be disclosed to any agency of the Federal Government having a working relationship with regard to Office of Personnel Management activities, to the intelligence agencies of the Federal Government, or to others having reasons as published in the Federal Register. In most instances a copy of the report of investigation will be maintained in OPM's system of records and may be used in future employment or security clearances and access determinations. You have the right to obtain a copy of the report and to request amendment to the file.

EFFECTS OF NONDISCLOSURE

You are not required to supply the information on the attached form. If you do not furnish the information requested, the processing of your case will be suspended, and you will receive no further consideration. If you furnish only part of the information required, the processing of your case will be attempted; however, it may be significantly delayed. If the information withheld is found to be essential to processing your case properly, you will be so informed, and your case will receive no further consideration unless you supply the missing information. Although no penalties are authorized if you do not supply the information requested, failure to supply such information could result in your not being considered for employment or in your being terminated from employment based upon information in the record. A false answer to any question on this form is punishable by law (Title 18, U.S. Code, section 1001).

INFORMATION REGARDING DISCLOSURE OF YOUR SOCIAL SECURITY NUMBER  
UNDER PUBLIC LAW 93-579, SECTION 7(b)

Disclosure by you of your Social Security Number (SSN) is mandatory to obtain the services, benefits, or processes that you are seeking. Solicitation of the SSN by the United States Office of Personnel Management is authorized under provisions of Executive Order 9397, dated November 22, 1943. The SSN is used as an identifier throughout your Federal career from the time of application through retirement. It will be used primarily to identify your records that you file with the Office of Personnel Management or agencies. The SSN also will be used by the Office of Personnel Management and other Federal agencies in connection with lawful requests for information about you from your former employers, educational institutions, and financial or other organizations. The information gathered through the use of the number will be used only as necessary in personnel administration processes carried out in accordance with established regulations and published notices of systems and records. The SSN also will be used for the selection of persons to be included in statistical studies of personnel management matters. The use of the SSN is made necessary because of the large number of present and former Federal employees and applicants who have identical names and birth dates, and whose identities can only be distinguished by the SSN.

NOTICE TO INDIVIDUALS THAT A PERSONNEL INVESTIGATION FILE  
IS BEING MAINTAINED IN OPM'S SYSTEM OF RECORDS

The Office of Personnel Management (OPM) recently completed a personnel investigation of you, conducted for the purpose of determining your fitness for employment in the Federal service or for security clearance and access determinations.

A copy of the report of Investigation will be maintained in the system of records at OPM for a period of seven (7) years and may be used in future employment or security clearance and access determinations in the Federal service.

Under the provision of Public Law 93-579 (Privacy Act of 1974), you have the right to obtain a copy of the report and to request amendment to the file. If you desire a copy of the investigative file you should provide your full name; date of birth; social security number; the address you desire the copy of the report to be mailed to; your signature; and send your request to:

Office of Personnel Management  
Division of Personnel Investigations  
P.O. Box 886  
Washington, D.C. 20044  
Attn: Release of Information Section